

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF &
APPENDIX**

75-2044

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Stephen M. Latimer

B

P/S

* * * * *
ZACHARY MORGAN, *
Appellant, *
-against- *
EDWIN J. LaVALLEE, Warden of *
Clinton State Prison, *
Officers of Unit 14 et. al., *
Appellees. *

* * * * *

APPELLANT'S BRIEF
AND APPENDIX

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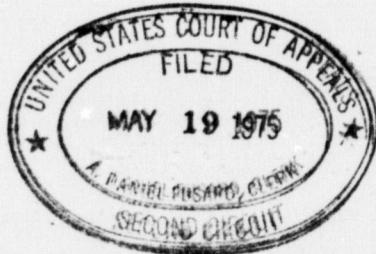


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ZACHARY MORGAN,

Appellant, :

-against- :

EDWIN J. LAVALLEE, Warden of Clinton
State Prison, Officers of Unit 14, et. al., :

Appellees. :

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Appellant appeals from a decision of the United States District Court for the Northern District of New York by Honorable James T. Foley, dismissing his complaint without a hearing. Although substantial violations of First Amendment rights are alleged, Judge Foley dismissed the complaint on the ground that Appellant had failed to exhaust his State remedies. Appellant contends that in an action pursuant to 42 U.S.C., 1983, based on the rights of a prisoner to receive literature, and to correspond with family and friends, he may sue in Federal Court in the first instance, particularly where, as here, State remedies are either futile or non-existent.

ISSUES PRESENTED

1. Does Appellant's pro se handwritten complaint alleging, inter alia, that:
 - a) he was refused permission to receive a specific publication,
 - b) that an institutional order barring correspondents from sending him postage stamps effectively prohibited him from corresponding with family and friends, and
 - c) he was placed in solitary confinement for his political beliefs, present substantial claims of deprivations of the First Amendment rights?
2. Did the District Court err in requiring Appellant to exhaust State administrative remedies which are either non-existent or futile?

STATEMENT OF THE CASE

Appellant, a prisoner incarcerated at the Clinton Correctional Facility, filed a handwritten pro se complaint in the United States District Court for the Northern District of New York, pursuant to 42 U.S.C., Section 1983, seeking to enjoin Appellees from violating his First and Fourteenth Amendment rights. Judge Foley, sua sponte, entered a Memorandum Decision and Order, dated April 4, 1974, dismissing the complaint (8) without requiring a response by Appellees. Judgment was entered accordingly on April 5, 1974 (10), and a timely Notice of Appeal was filed (13). Counsel was appointed for this appeal pursuant to order of this Court dated April 5, 1975.

The pro se complaint, which must be construed liberally, Haines v. Kerner, 404 U.S. 519 (1972), alleges deprivations of substantial rights under the First and Fourteenth Amendments. Taking its allegations as true, which the Court must for purposes of a motion to dismiss, Cooper v. Pate, 378 U.S. 546 (1964), Corby v. Conboy, 457 F 2d 251 (2nd Cir. 1972), the record shows that Appellant was transferred from Attica Correctional Facility on February 8, 1974, where he was confined in Unit 14 (Clinton's segregation unit) because of his political beliefs until at least the date of complaint was filed (6), without any disciplinary hearing.

On February 19, 1974, Appellant was told that his correspondents would not be permitted to send him postage stamps. Because he is indigent, Appellant was unable to buy stamps at the prison and was effectively barred from communicating with friends and relatives (4-5). Repeated requests to the Correspondence Department for reasons for this action went unanswered (5).

On February 25, 1975, Appellant was told that "your Midnight Speical, January, 1974, Vol. 4 No. 1 [is] in violation of Department Guideline No. 6" (5).^{FN} At the time being in Unit 14, he had no access to Guideline No. 6, and was never advised of the reasons for denying him this publication. As before, his requests for review of the decision have fallen on deaf ears (5).

FN. Guideline No. 6 is found in Administrative Bulletin No. 60 dated May 30, 1972. A copy is attached as Annex A.

POINT I

THE COMPLAINT ALLEGES SUBSTANTIAL
VIOLATIONS OF APPELLANT'S FIRST
AMENDMENT RIGHTS.

It is beyond cavil that prisoners do not shed their constitutional rights at the prison gates. Among the rights retained are the right to not be further deprived of liberty or property without due process of law, Wolff v. McDonnell, 418 U.S. 539 (1974), the First Amendment right to hold and express beliefs, and to receive information, Stanley v. Georgia, 394 U.S. 557 (1969), Goodwin v. Oswald, 462 F2d 1237, 1241 (2nd Circuit 1972), Pierce v. LaVallee, 298 F 2d 233, 235 (2nd Cir. 1961), Newkirk v. Butler, 364 F. Supp. 497 (S.D.N.Y. 1973), Aff'd. 499 F 2d 1214, (2nd Cir. 1974), cert. granted U.S. (1974), Sobell v. Reed, 327 F. Supp. 1294, 1304 (S.D.N.Y. 1971), and the right to send mail to family and friends subject to reasonable regulation Procunier v. Martinez, 416 U.S. 3961 (1974), Sostre v. McGinnis, 442 F. 2d 178, 199 (2nd Cir. 1971), Corby v. Conboy, supra, Carothers v. Follette, 314 F. Supp. 1014, 1024-25 (S.D.N.Y. 1970). In Procunier v. Martinez, supra, the Supreme Court rejected a "prisoner's rights" approach to First Amendment guarantees in the prison setting because censorship of communication with someone outside the prison "implicates more than the right of prisoners," Id, 94 S. Ct. at 1809, but cautioned that those guarantees must be applied in light of the characteristics of the environment. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

The Court then adopted the four part test of U.S. v. O'Brien, 391 U.S. 367, 377 (1968):

"[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The same principles apply to mail censorship and to the right to receive or distribute publications inside the prison. The Luparar v. Stoneman, 382 F. Supp. 495, 499 (D.C. Vt. 1974). This Circuit holds that a compelling state interest unrelated to the suppression of free expression exists only if there is a clear and present danger to prison security, or of a breach of prison discipline, or of some substantial interference with orderly institutional administration. Corby v. Conboy, supra, Sostre v. McGinnis, supra, 442 F. 2d at 200, Sostre v. Otis, 330 F. Supp 941 (S.D.N.Y. 1971). Fortune Society v. McGinnis, 319 F. Supp. 901, 904 (S.D.N.Y. 1970). Carothers v. Follette, supra.

The record is barren of any clear and present danger that would justify Appellee's actions barring Appellant from receiving the Midnight Special, a publication that has a wide circulation among prisoners throughout the nation; and preventing him from communicating with family and friends by prohibiting him from receiving postage stamps.

A. Appellee's Refusal to Let Appellant Receive The
Midnight Special Violates His First Amendment Rights.

The prison authorities may deny a prisoner the right to receive a publication only in very limited circumstances when that publication presents a clear and present danger to the prison. In Procunier, supra, the Supreme Court invalidated regulations authorizing censorship of statements that, among other things, express inflammatory political, racial or religious views and other matter deemed defamatory. 416 U.S. at 413. Applying this holding to a prison newsletter, the Court in The Luparar stated that it:

has examined the articles in question and while it does not in any way approve of their tone and content, it does not find that they threaten the governmental interests of security, order and rehabilitation, either individually or collectively. The basis for the objections of the state to such articles are similar to the basis for the mail censorship struck down by the Supreme Court in Procunier v. Martinez, supra. The fact that an article is critical, attacks personalities, or is even defamatory, is not a sufficient reason standing alone to suppress the publication in which it appears.

382 F. Supp. at 500.

This, of course, merely codified existing principles. Thus, Federal Courts have routinely overturned decisions of prison authorities denying to inmates specific publications that they deemed inflammatory, e.g., Walker v. Blackwell, 411 F. 2d 23, (5th Cir. 1969 (, Muhammed Speaks), Fortune Society v. McGinnis,

supra, (Fortune News), Shakur v. Commissioner of Correction, 69 Civ. 4493 (S.D.N.Y. 1869), (Black Panther Party Newspaper).

The January 1974 issue of the Midnight Special suppressed by appellees was not before the Court. There is no evidence on the record that the publication presents a clear and present danger to prison security, discipline or administration. The record is clear that Appellant was not permitted to receive a publication of unknown content based on a purported violation of a regulation that neither he nor the District Court had before them, (5), and that was not readily available because of Appellant's confinement in segregation. The matter should be remanded on this issue to develop the full facts.

B. Withholding Postage Stamps From Appellant Is An Arbitrary and Unconstitutional Form of Censorship.

The right of a prisoner to correspond with family and friends is subject to reasonable regulation that:

furthering one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthering an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

Procnier v. Martinez, supra, 94 S. Ct. at 1811. Ccrby v. Conboy,
supra, Sostre v. Mcginnis, supra, 442 F. 2d at 200. Carothers v.
Follette, supra, 314 F. Supp. at 1024-25. Blanket suppression of
mail for reasons other than those enunciated in Procnier, inhibits
the outside correspondents' right to receive communication from the
prisoner, and implicates their First Amendment rights as well.
The Luparar v. Stoneman, supra, 382 F. Supp. at 499.

Accepting the allegations of the complaint as true, it appears that Appellant, being indigent, relies on the generosity of his correspondents to furnish him with postage stamps. FN Absent this, "he is unable to defray the cost of postage" (6), and cannot mail letters. In effect, Appellees have imposed total censorship on Appellant's communication with the outside world, and have accomplished covertly that which they could not do directly.

Even under a more restrictive reading of the complaint, there is no showing that depriving Appellant of postage stamps furthers any substantial "governmental interest [that] is unrelated to the suppression of free expression." Procnier v. Martinez, supra, 94 S. Ct. at 1810. For instance, there is no evidence in the record

FN. The only regulation governing postage stamps is contained in Administrative Bulletin No. 20 amended, dated December 14, 1972. (A copy is attached as Annex B). It provides in pertinent part:

"The facility will provide you with postage for one letter a week. You must pay the postage for your other correspondence."

Nowhere do the regulations prohibit a prisoner from receiving postage stamps from others outside the prison.

whether Appellant's correspondence with family and friends was completely severed, or whether there were alternate means for Appellant to procure postage stamps. Most important, there is no showing that permitting Appellant to receive stamps from his correspondents presents a clear and present danger to prison security, discipline or orderly prison administration. Having stated a clear constitutional violation in his complaint, Appellant should be permitted to prove this claim. Corby v. Conboy, supra.

C. Appellant May Not Be Punished For His Political Beliefs

Because First Amendment rights occupy a preferred position in our panoply of individual freedoms, it is virtually uncontested that "one may not be imprisoned or executed because he holds particular beliefs." American Communications Association v. Douds, 339 U.S. 382, 408 (1950). Likewise, in the prison context, an inmate may not be punished solely because of religious or political beliefs. Cooper v. Pate, supra, Lee v. Washington, 390 U.S. 333 (1968), Newkirk v. Butler, supra, Sostre v. McGinnis, supra Fulwood v. Clemmer, 206 F. Supp. 370 (D.C. D.C. 1962). The content of the belief is irrelevant because the right to hold beliefs, regardless of social worth, is fundamental to a democratic society. Stanley v. Georgia, supra, 394 U.S. at 564, Winters v. New York, 333 U.S. 507, 510 (1948). Recognizing, as Judge Foley did, that "[s]egregation is not per se unconstitutional unless constitutional rights are violated in its imposition," (9) the allegation that

Appellant was placed in Unit 14 because of his political beliefs is sufficient to sustain his claim that Appellees have violated his First Amendment rights.

Moreover, a liberal reading of the complaint reveals that Appellant was placed in Unit 14 immediately after his arrival in Clinton without a hearing (4), and remained there. No matter the reasons for his confinement, under this Court's rule in Sostre v. McGinnis, supra, in effect at the time the claim arose, prior to the imposition of punishment a prisoner must be given adequate notice, Id at 203, be confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to rebut the charges. Id at 198. The arbitrary imposition of solitary confinement for his political beliefs therefore violates Appellant's right to due process of law as well as his First Amendment right to hold and express beliefs.

POINT II

APPELLANT IS NOT REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES BEFORE SEEKING REDRESS IN FEDERAL COURT.

The Civil Rights Act, 42 U.S.C., Section 1983, was cited specifically to provide redress in Federal Courts "where the state remedy, though adequate in theory was not available in practice," "Monroe v. Page, 365 U.S. 167, 174 (1910). In Corby v. Conboy, supra, 457 F 2d at 253. This Court reversed a decision by Judge Foley sua sponte, dismissing a prisoner's civil rights petition stating:

Though the plaintiff has not exhausted his state court remedies, claims of denial of constitutional rights under §1983, are not subject to such requirements. See *Monroe v. Pape*, 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); *Houghton v. Shafer*, 392 U.S. 1969, 640 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968). Furthermore, inmates of state prisons "are not held to any stricter standards of exhaustion than any other civil rights plaintiffs." *Wilwording v. Swenson*, 404 U.S. 249, 92 S. Ct. 407, 20 L. Ed. 2d 418 (Dec. 14, 1971).

See also Preiser v. Rodriguez, 411 U.S. 475, 477 (1973).

Although Corby says that State judicial remedies need not be exhausted, the Supreme Court in Steffel v. Thompson, 415 U.S. 472 (1974) held that:

"[w]hen federal claims are premised on 42 U.S.C., §1983 and 28 U.S.C. §1334(3)- as they are here - we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.
(Emphasis supplied).

Subsequent to Steffel, this Court in Plano v. Baker, 504 F. 2d 595 (2nd Cir. 1974), reversed another decision of Judge Foley, dismissing a civil rights action for failure to exhaust administrative remedies, and held that the exhaustion requirements of Eisen v. Eastman, 421 F. 2d 560 (2nd Cir. 1969), and Blanton v. State University of New York, 489 F. 2d 377 (2nd Cir. 1973), do not apply where State remedies are futile or inadequate. Plano v. Baker, supra, 504 F. 2d at 597.

Thus, even if Eisen and Blanton are valid after Steffel, (and Appellant contends that they aren't, see McCray v. Burrell, 43 L.W. 2447 (4th Cir. April 10, 1975)), their applicability is severely limited.

In Plano a probationary teacher was discharged from his employment for activity protected by the First Amendment. Instead of appealing to the Commissioner of Education, he sued under Section 1983. Among the factors considered by the Court in holding that the administrative remedy was inadequate, was the fact that constitutional issues, "particularly in the First Amendment area, lie within the expertise of courts, not the expertise of administrators." Id at 599. Appellant is in a similar position. He alleges substantial deprivations of his First Amendment rights involving censorship of publications and correspondence, matters within the peculiar expertise of the Federal Courts. He should not be held to a stricter standard of exhaustion than any other civil rights plaintiff. Wilwording v. Swenson, supra.

Moreover, Appellant has exhausted the meager remedies available to him. After receipt of the notice by the Media Review Committee rejecting the Midnight Special, Appellant wrote the Committee to explain his position (5), but has received no response. (5). Any further review is automatic. Admin. Bull. No. 60, P. 3, Item 5. Thus to require Appellant to seek further redress in the State prison system, is to superimpose a procedure not required by the State; nor intended by this or any Court.

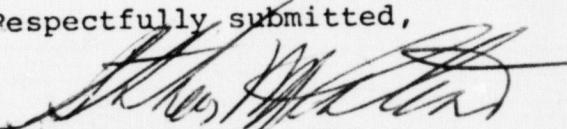
Further, Judge Foley was clearly in error when he dismissed Appellant's claimant denial of postage stamps. Administration Bulletin No. 20 contains no provision for administrative review of the order given to Appellant. 7 N.Y.C.R.R. Parts 250, 260, and 270 cited by Judge Foley as an avenue of administrative review (9) are in aposite. Those regulations govern disciplinary proceedings in the States prisons, and review thereof. They are not concerned with review of purely administrative actions.

The State has shown neither a compelling interest in curtailing Appellant's First Amendment rights, nor has it provided an adequate remedy to redress the deprivations caused thereby. The Federal Court is therefore the proper forum to remedy the substantial constitutional violations alleged.

CONCLUSION

Appellant has alleged clear and substantial violations of his First Amendment rights. He should be permitted to establish those claims at a trial in the District Court. Accordingly, the action should be remanded to the District Court for the Northern District of New York for further proceedings.

Respectfully submitted,


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May 30, 1972

ADMINISTRATIVE BULLETIN #60

TO: Superintendents of Correctional Facilities and State Institutions, Directors of State Hospitals, Central Office Group Heads and Division Heads, and Directors and Supervisors of Parole Field and Institutional Offices.

FROM: Russell G. Oswald, Commissioner

RE: Guidelines and Procedures Governing the Receipt and Review of Literature and Related Materials for Inmates.

In accordance with Department Practice of ongoing review and revision of existing policy, Administrative Bulletin #2 Amended is hereby canceled. Consequently, instructions contained herein supersede the following Departmental Directives:

1. Administrative Memo #81, issued March 24, 1971;
2. Administrative Bulletin #2, issued April 29, 1971;
3. Procedural Supplement to Administrative Bulletin #2;
4. Administrative Bulletin #2 Amended, issued 9/7/71.

The following policy and procedures now apply on this subject.

Departmental policy is to allow access by inmates to literature and related materials for either program or private individual use. Accordingly, inmates shall be allowed to subscribe to or receive from authorized correspondents a wide range of books, magazines, and newspapers. As many inmates are undereducated and lack avocational interests, their reading of worthwhile materials is to be encouraged and guided. The understanding of the content of a wide range of subject matter may contribute to the development of a more knowledgeable and responsible human being with increased capacity to understand and adjust to society.

There are, however, some inmates whose emotional instability and anti-social attitudes are such that access to certain material may lead to individual behavior or behavior by groups of inmates which threatens the safety and security of the institution for both staff and other inmates, and which deters the operation of a therapeutic program. In such cases some censorship or prior restraint of inflammatory, obscene or disruptive literature is necessary to deter unrest, violence, and maladjustment.

In order that Department employees might be instructed concerning the proper review of literature for inmates, the Department specifies the following guidelines by which literature for inmates will be evaluated.

1. In general, the materials should be acceptable for regular mailing in the United States.
2. In general, publications which are utterly without redeeming social value, or which clearly depict acts involving necrophilia, masochism, sadism, bestiality, or unnatural preoccupation with excrement, are not

acceptable. Otherwise, literature dealing with the subject of sex is to be considered appropriate.

3. The publication should not defame, villify or incite hatred towards persons because of their race, religion, creed or national origin.
4. The publication should not advocate the violent overthrow of the existing form of government of the United States or of this State. (See Penal Law § 240.15).
5. The publication should not advocate lawlessness, violence, anarchy or rebellion against governmental authority or portray such conduct as a commendable activity.
6. The publication should not incite disobedience towards law enforcement officers or prison personnel.
7. The publication should not depict the use or manufacture of firearms, explosives and other weapons.
8. The publication should not be of such a nature as to depict, describe or teach methods and procedures for the acquisition of certain physical manipulations and skills which expertise will, in the opinion of Department authorities, constitute a threat to the safety, welfare and health of other inmates and employees.

Publications which discuss different political philosophies, and those dealing with criticism of Governmental and Departmental authority, are acceptable as reading material provided they do not violate the above guidelines.

The foregoing guidelines have been broadened and simplified for the purpose of facilitating easier access by inmates to a wide range of literature.

Superintendents and staff of Correctional Facilities are urged to use whatever available means they have to provide facility libraries with literature which presents differing points of view relevant to the issues of the day. This latter point is important in view of the highly biased and slanted nature of the literature which inmates are currently requesting.

In view of the above considerations, the department specifies the following procedures for evaluation and decision-making regarding literature for inmates.

CORRECTIONAL FACILITY MEDIA REVIEW COMMITTEE

Each institution will establish a media review committee. It is suggested that this committee consist of the head of the service unit or his representative, a member of the Mental Hygiene staff, the chaplains, the librarian, and a representative of the custodial services.

The Superintendent will inform the Commissioner of the membership of the Facility Review Committee, by notifying the Chairman of the Departmental

Media Review Committee. The Superintendent will also inform the Commissioner of any changes in said membership.

When it is determined that literature addressed or belonging to an inmate should be reviewed in order to ascertain its acceptability according to the guidelines of this bulletin, the facility review committee will meet to review the literature in question, and will be guided by the following:

1. The entire media review procedure must be exercised within a period of time not to exceed six weeks from the date the literature is received into the facility. That is to say the entire review process, from facility to Albany, to facility, must be complete before expiration of said six weeks period.
2. Initially, inmates will be advised in writing of such review so that they will be informed of the reason for delay in the receipt of their literature. Inmates may be invited to submit a written statement to the facility committee in explanation of their desire for the literature.
3. The facility committee will consider the inmate's literature, written statement and other pertinent information. Subsequently, the committee will issue a decision which shall be subject to approval by the Superintendent.
4. Acceptable literature will be given promptly to the inmates.
5. If the facility committee rejects the literature and the Superintendent upholds such decision, said literature will be forwarded to the Departmental Media Review Committee, with the inmate's statement and the Departmental Media Review Transmittal Report justifying said rejection. Specific page numbers which demonstrate a violation must be cited.
6. Inmates will not be prohibited from subscribing to newspapers, magazines and periodicals, but shall be informed that individual issues will be withheld if information contained therein is confirmed to be in violation of the guidelines set forth in this Bulletin. Articles will not be cut out or otherwise removed from any publication.
7. If, after being advised of these conditions, inmates wish to subscribe to newspapers, magazines and periodicals they will be allowed to do so. No facility will place a permanent ban on any publication unless instructed to do so by the Commissioner, or other appropriate authority as the Commissioner may designate.
8. Newspapers shall be delivered to inmates only when received direct from the publisher. Otherwise, inmates may receive magazines, periodicals, journals, etc. and books from sources other than the publisher after such publications have been examined and approved in accordance with instructions contained herein.

DEPARTMENTAL MEDIA REVIEW COMMITTEE

The Departmental Media Review Committee is hereby established to assist

and guide each Correctional Facility Review Committee in reviewing literature for inmates.

The Commissioner designates the Deputy Commissioner of Program Services to exercise administrative responsibility over the Department's Media Review Program. It shall be under his direction that procedures are administered, and ~~news~~s and lists issued by the DMRC shall bear his signature.

The following Central Office Staff shall constitute official membership of the Departmental Review Committee:

1. Director of Education - Chairman
2. Director of Institutional Parole Services - Member
3. Director of Correctional Guidance - Member

An alternate member and staff assistants will be nominated as needed by the Chairman, and approved by the Deputy Commissioner of Program Services. Attorneys for the Department shall provide legal counsel as needed.

NOTIFICATION OF APPROVED AND DISAPPROVED LITERATURE

Each Correctional Facility under the jurisdiction of the Department will be sent a written notification of the Departmental Media Review Committee (DMRC) determinations. These notifications will be used by each facility committee to modify and up-date their own lists of approved and disapproved literature which will be posted in areas readily accessible to inmates, (i.e., cell blocks, library, school bulletin boards).

MASTER LISTINGS OF APPROVED LITERATURE

Periodically, the DMRC will send to each facility a master list of publications which prior review has demonstrated do not usually violate our literature guidelines. Such lists shall constitute the Periodic Master List of Approved Literature, Department of Correctional Services. Once a publication (book, magazine, periodical) has been included on the Master List by the Departmental Committee, no single issue should be disapproved because of an occasional feature or article which may contradict the established guidelines.

This Master List is not to be confused with the lists of approved and disapproved literature put forth by the DMRC regarding media referred to it by the Facility Committee; such review is concerned with single issues of periodicals and magazines, and not entire publications.

DISSEMINATION OF INFORMATION CONTAINED HEREIN

Superintendents will provide a means whereby all inmates, employees and members of the Facility Media Review Committee are informed about this Bulletin. Inmates shall be informed of the procedure used by the Department to determine the acceptability of their literature, as well as the guidelines used by the Department to determine such acceptability.

December 14, 1972

ADMINISTRATIVE BULLETIN #20 AMENDED

TO: Superintendents of Correctional Facilities, Director of State Hospital, Central Office Group and Division Heads, Parole Area Directors and Institutional Offices

FROM: Russell G. Oswald, Commissioner

RE: Revised Rules Governing the Correspondence Program for Inmates

This Bulletin amends Administrative Bulletin #20 issued January 31, 1972, and presents revised rules which now govern the correspondence program for inmates.

Pending the issuance of the revised Inmates' and Employees' Rule Books, appropriate dissemination of the rules and procedures contained herein shall be made.

Departmental objectives include the re-socialization of inmates and assistance in the solution of their personal and legal problems. Accordingly, correspondence and visits with family members, friends, business associates, former and prospective employers, governmental officials and counsel may contribute to the good morale and treatment of inmates, and future good adjustment in the facility and in the community.

Pursuant to the on-going policy of effecting needed review and revision of inmate rules, the revised rules governing the correspondence program for inmates are hereby prescribed:

Introduction: You are encouraged to maintain contact by correspondence with your family, friends and others. We want to help you to do so. Therefore, a minimum number of positive rules are necessary, and they are set forth to guide the participation in the correspondence program of all concerned. This includes you, those who correspond with you, and the correctional facility employees.

1. You may correspond with anyone through regular channels, and in keeping with all rules governing the correspondence program.

2. Correspondence with specific persons will be subject to identification by you of the individual by name and address, purpose of the correspondence, and verification from the individual that he or she desires to correspond with you.

You may want to correspond from time to time or on special occasions with family members, friends, former or prospective employers, members of the clergy, governmental officials, an attorney or a representative of the news media. Such correspondence will be subject to the rules governing the correspondence program.

Special permission must be obtained by you from the Superintendent for correspondence with unrelated persons who have marital ties, crime partners, inmates in other facilities in this or other states, and persons currently on probation or parole.

3. The envelope and contents thereof of outgoing and incoming correspondence will be inspected to ascertain that there is nothing present therein which jeopardizes the safety and security of the facility.

4. The facility will provide postage for you for one letter per week. You must pay the postage for your other correspondence.

5. A record of your incoming and outgoing correspondence will be maintained.

6. Your correspondence must be written on stationery provided or authorized by the facility for such purpose.

7. If you are unable to read or write, a staff member or an inmate may assist you in regard to your correspondence.

8. Incoming and outgoing correspondence should be in the English language. Correspondence not in the English language will be processed as rapidly as practical.

9. Special correspondence to public officials and attorneys: You may write to the President of the United States, Members of Congress, Governor of the State, Members of the State Legislature, State Commissioner of Correctional Services, Chairman of the State Board of Parole, to any Judge and to attorneys at law.

The envelope and letter will be examined prior to mailing to insure absence of contraband. The letter will not be read or censored. Incoming letters from the above will be opened and examined in your presence to insure the absence of contraband. The incoming letter will not be read or censored. For your information censor means to delete some or all of the contents of a letter.

10. In emergencies relating to the death or critical illness of your family members, you may send and receive telegrams at your expense if funds are available, and at State expense if you are without funds.

11. While you are encouraged to correspond regarding your participation and progress in authorized correctional programs, family matters, future employment and residence plans and legal problems, the following materials or contents are not authorized to be in correspondence: statements which are obscene or lewd, contain threats, imply blackmail, imply plots to escape, discuss criminal activities, contain codes to circumvent understanding of contents, plots to use overt action to overthrow lawful authority, solicitation of personal property or funds, and plans to evade rules of the facility.

12. When your letter and/or the contents thereof are found to be contrary to the rules governing correspondence, the letter will be returned to you with notification as to the reason; when it is found that the incoming letter and/or contents thereof are contrary to the rules governing

correspondence, the letter will be returned with explanation to the sender, if known; otherwise it will be placed in your file.

13. If a person receiving a letter from you rejects the correspondence, you will be notified that such rejection is to be respected. You may refuse to correspond with any person.

14. Violation of rules governing the correspondence program may result in cancellation of the correspondence between the parties involved.

15. You are authorized to possess and take with you on transfer or release all of your personal correspondence.

Some procedural guidelines regarding the correspondence program are set forth for the staff:

Reference Rule 1 and Rule 5: An approved correspondence list per se is no longer necessary or to be maintained. However, in conformance with Rule 5 a record of correspondents will be maintained. There is no limit on correspondence, incoming or outgoing.

Reference Rule 2: Upon an inmate's application to correspond with a person, a form letter should be sent to the person to determine relationships or associations with the inmate, whether the person desires to correspond with the inmate, and to inquire regarding the factors in the third paragraph of Rule 2.

Forms and procedures for their use will be provided to all facilities by the Office of the Deputy Commissioner for Program Services.

Reference Rule 3: Authorization is hereby given to limit the review of incoming and outgoing mail to inspection only rather than to reading of all mail. The present rules covering special correspondence are in no way effected by this revision.

Authorization is given also for both inspection and reading of incoming and outgoing correspondence, other than special correspondence of selected inmates to insure the safety and security of the facility. This latter authorization by memo to inmate's file specifying the necessity to do this as related to insuring the safety and security of the facility is to apply to a limited number of inmates designated specifically by the Superintendent or his designated representative. Such authorizations are to be reviewed periodically.

Reference Rule 5: Continue to use the Departmental record form for this purpose (Correspondence Record Card-Form I-18).

Reference Rule 6: The present Departmental inmate's stationery form may continue to be used (Departmental Letterhead-Form I-21).

Reference Rule 8: In view of Rule 3 and reference thereto, correspondence in a foreign language will not be subject to reading unless such correspondence is that of a specific inmate whose correspondence has been designated for review per reference 3 above.

Reference Rule 9: Each inmate will be instructed that the Superintendent's form letter or message to the addressee will be inserted in the same envelope together with his confidential correspondence. In order to effect this procedure, the inmate will bring his confidential letter to a responsible employee, as designated by the Superintendent, who shall place the Superintendent's form message inside the envelope with the inmate's letter. This procedure shall be accomplished in the presence of the inmate and without reading or censoring his correspondence. The envelope will then be sealed by the inmate himself.

Reference Rule 10: All legal correspondence (inmate petitions, court litigation, letters to judges and attorneys) shall bear the inmate's NYSIIS number on the lower lefthand corner of the envelope.

A P P E N D I X

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* * * * *

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

1

D. C. Form No. 106 Rev.

	PROCEEDINGS	Date Order or Judgment Noted
15	(1) Filed civil rights complaint	
5	(2) " Memorandum-Decision and Order (4/4/74) dismissing complaint, and directing same be filed without payment of fee-SO ORDERED-HON. JAMES T. FOLEY, USDI	
5	(3) Filed Judgment	
15	(4) " application for certificate of probable cause	
15	(5) " Memorandum-Decision and Order (4/12/74) denying certificate of probable cause and directing Notice of Appeal if mailed to Clerk be filed without payment of fee-SO ORDERED-HON. JAMES T. FOLEY, USDI	
23	(6) Filed Notice of Appeal-copies sent to Clerk, CCA, and Atty Gen. Louis J. Lefkowitz	

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----* Index No.

ZACHARY MORGAN,

Petitioner,

-vs-

EDWIN J. LAVALLE, Warden of Clinton
State Prison, Officers of Unit 14,
et. al.,

PETITION FOR SHOW CAUSE
ORDER

pursuant to: 42 U.S.C.
§1983.28, U.S.C. §1343(3)
and U.S. Const. Admends'
I, IV, VI and XIV

Respondents.

-----*
TO: HON. EDMUND PORT, DISTRICT JUDGE (N.D.N.Y.)
U.S. DISTRICT COURT, UTICA, NEW YORK 13503

JURISDICTION

Petitioner, ZACHARY MORGAN, #48345, is hereby petitioning this Honorable Court to enter a Show Cause Order against Edwin J. Lavalle, Warden of the Clinton State Prison; the officers of Unit 14, et. al., and also for an immediate preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, directing the respondents to cease and desist forthwith, from proceeding further, under guise of Constitutional, Federal and State law, as set-forth herein (please see cause of action). The above named respondents have willfully and knowingly, violated petitioners rights both under the U.S. Constitution, Amendments I (First), IV (Fourth), VI (Sixth) and XIV (Fourteenth); and his rights and liberties as guaranteed him under the Civil Rights Act, and this Honorable Court has jurisdiction over the within alleged acts to entertain the same, in a court of law and equity under the

authority of Title 42 United States Code, Section 1983, and its jurisdictional complement, Title 28 United States Code, Section 1343(3).

CAUSE OF ACTION

I, Zachary Morgan, #48345, being First duly sworn, according to law, deposes and says: that

1. He is now, by way of transfer from the Attica State Prison on February 8, 1974, an inmate in servitude at the Clinton State Prison, (hereinafter Clinton), located in the town of Dannemora, County of Clinton, State of New York.

2. That petitioner upon his arrival to Clinton was placed in Unit 14, and did, some four days thereafter, examine his property, from which was missing the following articles: "one multicolored towel (black & red), one pair of personal brown underwear, one grey sweatshirt, and two personal letters from Ms. Sabrina Ferguson & Ms. Florence K. Trunk, respectively (received Feb. 7, 1974). Petitioner with the knowledge of having seen the above mentioned articles, before leaving Attica, requested from the respondents an answer and/or some assistance in locating the above missing property, but was told that the respondents felt that they were under no compulsion to honor your petitioner's request, and after several concerted endeavors was blatantly told that either he sign for the property or linger on in what would be tantamount to a stripcell.

Petitioner believes that the respondents, in view of their neglectful and unresponsive attitudes, should be made to show cause for their arbitrary actions, as well as to compensate the

petitioner for the loss and damage to his property.

3. On or about the 25th of Feb., 1974, petitioner received from the Clinton Media Review Committee, a memo that inter alia, stated, and I quote: "Institution Media Committee has adjudged your Midnight Special - 1/74 Vol. 4, No. 1 in violation of Department Guideline #6" (sic). It is to be noted that the respondents even thought they purport that the 1/74 issue of the Midnight Special violates Dept. Guidelines #6, they do not attempt to familiarize this petitioner with the Guideline, nor do they as many recent Federal decisions require, describe the compelling state interest centering about prison security or discipline, to justify the serious and irreparable injury to a preferred freedom under the First Amendment. I, by letter, contacted the Committee in an attempt to redress this restriction, but to date, my words have seemingly fell or deaf ears. Petitioner believes that the few liberties he retains while in servitude will be severly impaired, if this Honorable doesn't intervene.

The respondents are surreptitiously imposing their will upon me, and are flagrantly arresting my ramifications, and should in accordance with Rule 65(a) of the Fed. R. Civil P., be enjoined from further denying me the Midnight Special, unless they can show a compelling basis for such an infringement. (See: Fortune Society v. McCoinnis, Supra, and Sostre v. Otis, 330 F. Supp. 941 [S.D.N.Y., July 28, 1971].

4. On the 19th day of February, 1974, petitioner received a memo from the Clinton Correspondence Dept., that directed him to advise the people on his correspondence list, not to send him

stamps - which in comparisor to his state of pauperism, denys him his right to expression via the mail, in that he is unable to defray the cose of postage, and the respondents will not loan and/or mail his letters, until he receives money. They have not as per my requests told me why I cannot receive stamps and are thereby holding me incommunicado. (Emphasis Supplied)

5. Petitioner since his arrival to Clinton has been harassed and relegated to Segregation, becuase of his political beliefs. He has had to undergo and been subjected to continous confinement for his refusal to partake in the neo slavery program that emanates from Unit 14, which among other things consists of, washing bowls, stripping before exchanging linen, and standing at your door when talking to an officer.

Petitioner has searched the Correction law, Minimum Standards, Departmental Rules and Regulations and the other outlets that contain statues relating hereto, : : hopes of locating the above mentioned practices, and has ran into a wall.

The respondents it should be noted, as per my request, indicate by what authority they impose their practices, and petitioner beleives that unless they can show some compelling regulation, the above reports should be made void and expunged from every file therein containing.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays that this Honorable Court will:

1. Grant injunctive relief against named respondents, enjoining them while this litigation is before the court. From,

- a. withholding the Midnight Special without real cause;
 - b. denying petitioner his right to expression by limiting his access to stamps; and
 - c. demanding that he wash bowels without compensation, and stripping for clothing exchanges, before he will be released from Segregation.
2. Allow petitioner proceeding in Forma Pauperis,
 3. Order respondents to Show Cause why he should not be compensated for property loss; and
 4. That this Honorable Court order any and all other relief as it may deem just and proper.

DATED:

Respectfully submitted,

ZACHARY MORGAN
Petitioner Pro Se #48345
Box B
Dannemora, New York
Nysiis No. 3016256-2

STATE OF NEW YORK)
COUNTY OF CLINTON) ss.:

I Zachary Morgan, under the petition of perjury, do hereby swear that the facts and allegations contained within this Petition for Show Cause Order are true and consistent with the truth.

Sworn to before me this
day of , 1975.

ZACHARY MORGAN #48345
Nysiis No. 3016256-2

NOTARY PUBLIC

MEMORANDUM-DECISION and ORDER

Petitioner, an inmate of Clinton Correctional Facility, seeks an order to show cause. Since the order sought is specifically one under 42 U.S.C. § 1983, his petition is treated as a civil rights complaint. The order to show cause requests an immediate preliminary injunction under F.R.Civ.Proc. 65(a).

Petitioner was transferred from Attica State Prison on February 8, 1974. He claims certain personal possessions have been lost or withheld from him since the transfer. Such type claim in my judgment does not rise to one of constitutional violation. This grievance should be reviewed under the administrative procedural rights the petitioner possesses.

Petitioner claims that the January 1974 issue of the Midnight Special was withheld from him. Department Guideline 6 in regard to publications is claimed to be violated. Petitioner indicates that he does not have Guideline 6, but he does not show that he has made an effort to obtain a copy which is readily available from the facility or its law library. Plaintiff must follow the procedures set forth in Guideline 6 to obtain final redress. These administrative procedures, I believe, must be exhausted as a condition precedent under Second Circuit rulings prior to federal court consideration under 42 U.S.C. 1983. Eisen v. Eastman, 421 F. 2d 560 (2 Cir. 1969); James v. Board of Education of Central Dist. No. 1, 461 F. 2d 566 (2 Cir. 1972).

Petitioner complains that he was told to write the people on his correspondence list not to send him stamps. No reason it is claimed was given for such statement. Plaintiff has a remedy against alleged arbitrary actions of this type by appeal to higher authority within the Correction Department under 7 NYCRR Parts 250, 260 and 270 up to Commissioner Preiser.

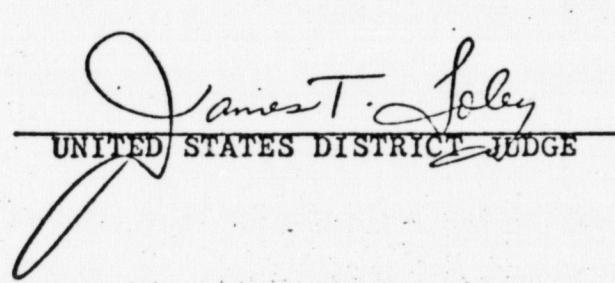
Petitioner complains that he has been placed in segregation because of his political beliefs. He also indicates that his confinement results from his refusal to perform work, including the washing of bowls and so forth. Segregation is not per se unconstitutional unless constitutional rights are violated in its imposition. *Sostre v. McGinnis*, 442 F. 2d 178, 192 (2 Cir. 1971).

Petitioner in my judgment has not shown the violation of any constitutional right. The complaint shall be filed without payment of fee, and is dismissed.

It is so Ordered.

Dated: April 4, 1974

Albany, New York


UNITED STATES DISTRICT JUDGE

10

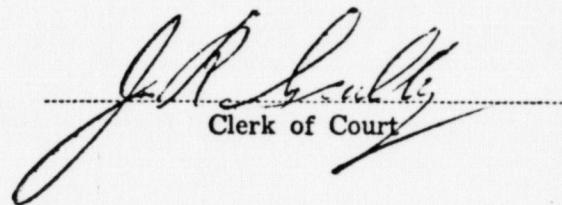
consideration
This action came on for ~~trial~~ (hearing) before the Court, Honorable James T. Foley

, United States District Judge, presiding, and the issues having been duly tried
considered
~~x~~ (hearing) and a decision having been duly rendered,

It is Ordered and Adjudged

complaint is dismissed.

Dated at Utica, New York , this 5th day
of April 1974 .


J.R. Foley
Clerk of Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ZACHARY MORGAN,

Petitioner,

74 Civ. 147

-against-

EDWIN J. LAVALLE, Warden of Clinton
State Prison, Officers of Unit 14,
et. al.,

APPLICATION FOR
CERTIFICATE OF
PROBABLE CAUSE,
Pursuant to Title,
28 U.S.C. §2253

Respondents.

I, Zachary Morgan, the petitioner named in the
above entitled case, being duly sworn, deposes and says:

That I am now in the early process of appealing
the Decision - Order of this Honorable Northern District
Court, James T. Foley, entered the 4th day of April, 1974,
in which the court dismissed my Petition for Show Cause
Order. Petitioner - Appellant now respectfully requests that
your Honor issue a Certificate of Probable Cause, concerning
the above action on the grounds that there are issues herein
which the United States Court of Appeals should consider.

Respectfully submitted,

Sworn to before me this
day of , 197

ZACHARY MORGAN
Petitioner - Appellant, Pro Se
Box B
Dannemora, New York 12929

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

12

ZACHARY MORGAN,

Petitioner,

-against-

74-CV-147

EDWIN J. LAVALLEE, Warden of Clinton
State Prison, Officers of Unit 14,
et al.,

Respondents.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

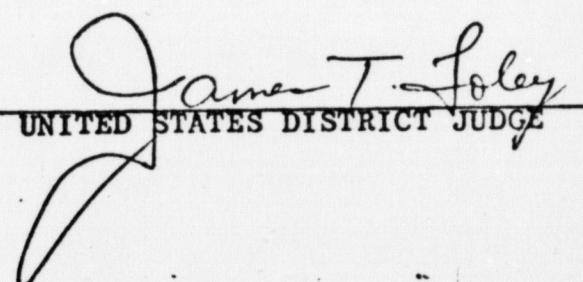
By decision dated April 4, 1974, I treated an application of the petitioner for an order to show cause as a civil rights complaint, and dismissed it. The petitioner now files an application for a certificate of probable cause pursuant to 28 U.S.C. 2253.

The issuance or denial of a certificate of probable cause relates only to habeas corpus applications. It is unnecessary to appeal from a civil rights complaint dismissed and if it is considered necessary, it is hereby denied. The petitioner states he is preparing a Notice of Appeal from my April 4, 1974 decision. If such Notice of Appeal is mailed to Clerk Joseph R. Scully, Federal Post Office Building, Utica, New York, it shall be filed without payment of fee.

It is so Ordered.

Dated: April 12, 1974

Albany, New York



UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ZACHARY MORGAN,

Petitioner,

NOTICE OF APPEAL

-against-

EDWIN J. LAVELLE, Warden of Clinton
State Prison, Officers of Unit 14,
et. al.,

74 Civ. 147

Respondents.

Notice is hereby given that the above named petitioner ZACHARY MORGAN, hereby appeals to the United States Court of Appeals, for the Second Circuit, from the order and decision of the Northern District of New York, Honorable Judge, James T. Foley, dismissing his Petition for Show Cause Order (42 U.S.C. §1983, 28 U.S.C. §1343(3)) entered in this action on the 4th day of April, 1974.

Yours, etc.,

ZACHARY MORGAN
Petitioner - Appellant Pro Se

Sworn to before me this
day of 197

NOTARY PUBLIC

CERTIFICATE OF SERVICE

This is to certify that on May 19, 1975, one copy of
the within Appellant's brief and Appendix was served
by regular mail on the Attorney General of New York
State at his office at 2 World Trade Center, New York,
N. Y.

A handwritten signature in black ink, appearing to read "Harry Winkler".